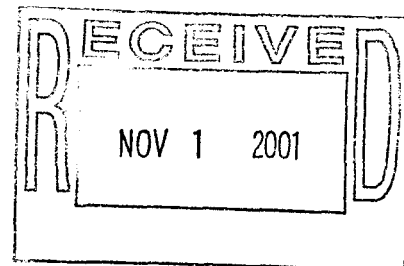


USDA:APHIS:Animal Care

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To Ms. Ann Terbush, OPR, Chief, Ppermits Office
Fax No.
From Barbara Kohn
Date/Time 11/01/2001 at 1:38PM
Subject Comments on Docket No. 001031304-0304-01
Pages 6, including this one



Ann - here are our comments on the public display regs. Overall seemed OK, but we have a few points of contention. Thanks.

Barb

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United States
Department of
Agriculture

Marketing and
Regulatory
Programs

Animal and Plant
Health Inspection
Service

Animal Care

4700 River Road
Riverdale, MD 20737

November 1, 2001

National Marine Fisheries Service
Office of Protected Resources
Permits Division (F/PR1)
1315 East West Highway, Room 13705
Silver Spring, MD 20910

Dear Ms. Terbush:

Thank you for the opportunity to comment on the proposed rule concerning Protected Species Special Exemption Permits, Docket No. 001031304-0304-01.

We support the introduction of regulations implementing the 1994 Marine Mammal Protection Act (MMPA). However, we have a few specific comments that need to be addressed during the promulgation of a final rule.

It was our impression, and that of several groups that commented to APHIS, that the supplementary information implies that your office consulted with and obtained consensus from APHIS on certain issues in the proposed rule. While we acknowledge that a number of issues addressed in the proposed rule have been routinely discussed between our Agencies, at no time were the discussion identified as being *germane* to the actual rule promulgation. Our approval was neither sought nor given in this context. Although presumably inadvertent, we request that the circumstances be clarified with regard to APHIS—APHIS did not knowingly participate in the development of the proposed rule.

We support the provisions of §216.43(a)(5), requiring temporary release authorizations for open-water training of captive marine mammals. Although the supplementary information explores the conditions under which such authorizations will be considered, we recommend adding language to this paragraph that identifies pinger-recall training in support of an approved APHIS emergency contingency plan,



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APHIS strongly supports the provisions of §216.37(e) to allow the importation, without permit, of marine mammal specimens for diagnostic or necropsy purposes. The proposed provision applies to any animal exported from the U.S. However, we recommend that the proposed provisions be extended to any captive marine mammal in a foreign jurisdiction for the stated purposes. This would benefit the global captive population of marine mammals and aid in the humane and effective management of the species.

We cannot support the changes to §216.43(b)(3)(ii) using the proposed wording. We agree with the intent of the changes specifying that the facility must comply with all applicable standards of the Animal Welfare Act regulations and standards (please note that the supplementary information referring to §§3.104-3.118 is not correct, as all licensees and registrants with marine mammals must comply with §§3.100-3.118 and all of Part 2 of 9 CFR, Chapter 1, Subchapter A). This is the goal of AWA enforcement, but there can be many times when a facility may have one or two minor noncompliant items cited on an inspection report. We do not feel that minor noncompliant items, as determined by APHIS, should preclude issuance of a permit in all circumstances. The MMPA requires only that the facility be licensed or registered under the AWA. We recommend removing the proposed reference to AWA compliance and, instead, consider language such as: "...7 U.S.C. 2131 *et seq.* The applicant must have an adequate compliance history under the AWA. The Office of the Director will consult with APHIS to determine adequacy of the applicant's compliance history."

We support the proposed provisions for re-export of marine mammals imported on breeding loan and for reimport of animals exported for the same purpose. This provision streamlines and simplifies the process of animal movement for population management of the species.

We support the transport and transfer notifications and emergency exemptions as Written in the proposed rule. The 15-day notification is consistent with the requirements of the MMPA, and the exemptions allow for emergency situations. We also support the periodic review of the exemption requests to make sure the provisions are not being abused.

However, in the interest of customer service and paperwork reduction, we cannot support provisions in the proposed rule requiring an official form for transfer/transport notification. As long as all the information required to complete the inventory is supplied, requiring the use of two specific forms (transfer/transport notification and inventory datasheet) and, in essence, double submission of the information by requiring the confirmation of the transfer/transport to be resubmitted with actual transaction dates, as well as reporting by both parties to the transaction, seems burdensome to the regulated parties. This is especially true in light of using ISIS for the inventory management. It is



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our understanding that ISIS reports can be **submitted** electronically. Requiring such duplicative paperwork ignores the convenience, efficiency, **and** paperwork reducing technologies available at this time. We recommend that reporting regulations offer an official **form** to be used, but provide a listing of information **required** for inventory control and allow regulated parties to choose the reporting format. We recognize that this may be less convenient for the Federal entity, but customer service principles dictate making procedures easier **and/or** less burdensome for the public.

Along the **same** lines, we cannot support the **claim** made in the supplementary information that using ISIS would enhance public **access** to the information (it is already **available** under **FOIA**, **and this** would not change for the general public), or that it would eliminate duplicate data collection (NMFS proposal already requires duplicative data collection **as** outlined in the proposal and **does** not appear to allow for electronic data entry by regulated parties),

We realize **that the issue of** "comity" is controversial, and it is beyond **the** scope of our authorities to comment on the legality of comity letters.

We wish to **make** one comment about the information provided **under** the Paperwork Reduction Act section of the **supplementary** information. **NMFS** does not appear to have accounted for the time it **takes to** provide the marine mammal export documentation required to substantiate compliance with the **requirement** for comparability of standards for humane **care and** treatment of **marine mammals** (that is, meeting or exceeding AWA **requirements**). This time, since it is spent in meeting an MMPA requirement, should be considered here **as well**.

Section 216.43(a)(4) outlines the proposed rights of inspection for NMFS as captive **marine** mammal facilities. This section appears to **exceed** the **current** mandated **authority** for **NMFS** under the MMPA. The MMPA, **as amended** in 1994, clearly **denoted** that **NMFS** did not have **any** authority over **the** captive care and maintenance of **marine** mammals. To **propose that NMFS has** the right to inspect **any marine** mammal in captivity disregards this mandate and appears to disregard **the legal findings of *Mirage Resorts v. Franklin***. **Further**, it proposes duplicative inspection **services**, as APHIS already inspects captive marine mammal facilities **under the AWA**. **NMFS** and **APHIS** have entered into a Memorandum of Understanding that addresses **the issue** of **inspections** and **sharing** information resultant from **the** inspections. **The** proposed activities of §216.43(a)(4) include not only **inspection of the animals**, but inspection of **all records** and **support facilities**. **Under the MMPA, NMFS' responsibility for** captive care facilities **is** to **assure** that the facilities are open to the public, have **an education** program based on current industry standards, and that the facility is licensed or registered **under the AWA**. **None of those responsibilities requires an** official on-site inspection. **Access** to the public



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and the education program are readily ascertained by direct communication **with** the facility and visiting as a member of the **public**. Licensure or registration **status under** the AWA is accomplished by calling APHIS. The proposed provisions not only allow for NMFS personnel to inspect, but for **NMFS** to designate anyone else to inspect. It provides the facility with no recourse if such an appointed inspector is from an animal rights organization or other **person** that may threaten the privacy and other rights of the facility. This proposed section must be amended to all NMFS **access** to records **and** materials **needed** to determine that a permit to hold marine mammals is needed or not. Beyond that, ail inspection responsibility remains with **APHIS** under the AWA.

Section 216.43(b)(5)(vii) needs to address the issue that **once an animal is** in captivity (taken **from** the wild), it is subject to **the** AWA. **Any** temporary holding **facility** should be licensed or approved **as a** site under an existing license **under** the AWA, Any AWA licensee or registrant must **have** a remote site **approved** prior to use. To not do so would be a violation of the AWA.

Section 216.43(e)(1) **refers to** the MMTN and requires the **original** to be **submitted** via certified mail if the notice was sent originally via facsimile. While **an** original signature may be required, we question the need to require **certified mail**. **Any** mail system that allows for tracking would be sufficient to check on compliance **with** this requirement. Registered, **certified**, express mail, tracking option **for** regular **first** class mail, or private services such as FedEx, UPS, Airborne, etc., would **all seem to meet** the **intent** of this requirement.

Section 216.43(e)(4)(vii) requires a cause of **death** to be reported. However, the MMPA language, **we** believe, requires a probable **cause** of death. **There are** many instances **where** the actual cause of death **may** be indeterminate. Language in **this** section should reflect the statutory requirement for probable cause of death. The **statutory** language does not require that an amended notification be filed **after 30** days noting a **definitive cause** of death.

Section 216.43(e)(5) would be more **user friendly** if it included the **address** for ISIS in **this** paragraph. The prior listing of the **address** is far **enough** away in the regulations **as** to be inconvenient for most users to find. Similarly, the NMFS **address should** be included at the end of §216.43(e)(8).

Provisions of §216.43(f)(1)(ii)(C) **are** contrary to the provision of **the Memorandum** of Understanding between **NMFS** and **APHIS**. **This paragraph is** being **put forth as a** requirement that APHIS **was** not **consulted on nor** agreed to. At the current **time there** is no definitive time limit of the evaluation for comparability of a foreign **facility** for care and maintenance standards for marine **mammals**. Each case **has** been handled individually. While we do not oppose a reasonable time frame for the **acceptance** of evaluation results,



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we cannot support these regulations imposing a time limit on APHIS. This provision, in its present form, would mandate APHIS policy and procedures, It is beyond the scope of authority for NMFS to impose such restrictions on another government agency. This provision must be removed.

In the table at the end of the docket, it would help to identify what "OD" stands for. Someone looking at the table alone would not know what this meant,

Thank you for the opportunity to comment on this proposed rule.

Sincerely,

7

Barbara Köhn
Senior Staff Veterinarian
Animal Care



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TOTAL P.06